

# The Fundamentals of Title IX

August 14, 2020

Walter | Haverfield Education Law Group Webinar  
*in partnership with BASA*



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## What is Title IX?

- **Title IX** of the Education Amendments Act of 1972 is a federal law that states:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."
- Title IX prohibits sex-based discrimination in educational programs and activities.



## Discrimination

- Discrimination is the act of treating people differently based on a protected characteristic (or stereotypes based on that characteristic)
  - Focus on access to education opportunities, resources, programs;
  - Disparate treatment in the workplace/school;
  - Disparate impact claims (neutral policies that have discriminatory impacts)





## Common Types of Protected Traits

- Race
- Color
- Religion
- Sex (gender)
- Military status
- National origin
- Disability
- Age
- Ancestry
- Marital status
- Pregnancy or
- Genetic information



## Title IX – Examples of Discrimination

- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
  - *“You can’t do that because you’re a man”*
- Provide different aid, benefits, or services or provide aid, benefits or services in a different manner
- Deny any person any such aid, benefit, or service
  - *“Only men can do that”*
- Subject any person to separate or different rules of behavior, sanctions, or other treatment
  - *“Women have to...but men don’t”*



## Sexual Harassment

- Any unwelcome sexual advance, request for sexual favors, or other unwanted verbal or physical conduct of a sexual nature when one or more of the following conditions are present
  - Quid pro quo
  - Hostile environment



wikiHow



## Categories of Harassment

- Quid Pro Quo Harassment
- Hostile Environment Harassment
  - Both are prohibited under the law







## Quid Pro Quo

- Quid Pro Quo (this for that) Harassment occurs when submission to **OR** rejection of sexual advances/requests is used as the basis for participation in an activity or class

**Example:** Teacher pressures a student into an intimate relationship by suggesting acquiescence will result in good grades. When teacher's advances are spurned, she issues an "F."

**Example:** Superintendent requests sexual attention from elementary school principal with a promise that if she goes out with him, he will recommend the issuance of a new employment contract.





## Quid Pro Quo

- They do/won't do this, so...
- They will/won't put up with this, so...
- If you do/don't...I will/won't...





## Quid Pro Quo

- May involve a power differential between parties
- Voluntary conduct between some may put observers in the position of believing that something sexual is necessary to get something favorable





## Hostile Work Environment

To establish unlawful harassment, one must show that the harassment was:

- A. Based on his/her sex;
- B. Unwelcome; and
- C. Sufficiently severe or pervasive to alter the conditions of employment or education or creates an abusive, intimidating, hostile or offensive working or school environment.



## Sexual Harassment

- Example: Teacher routinely tells sexual jokes in class, has a reputation for cornering female students and purposefully brushes up against and touches female students in a sexual manner
- Example: A male high school principal routinely inquires about the new female science teacher’s “chemistry” with her husband, comments about her appearance and how lucky her husband is to be married to her, shares explicit details regarding his own marriage, and asks her to do the same



## Hostile Environment

### A. Based on protected class status or lack thereof

- Must be based on protected class, i.e. sex.
  - If a principal is mean to a teacher because he does not like the teacher's pink clothes, this is not unlawful harassment under the anti-harassment laws.
- Can be the protected class of either the victim or the harasser.
- Verbally harassing conduct need not explicitly mention the protected class status, i.e. jokes may be chauvinist even if they do not mention "women" (or men) specifically.



## Hostile Environment

### B. Unwelcome

- Person did not solicit or invite the conduct and regards it as offensive.
- District must evaluate all surrounding circumstances to determine if conduct is unwelcome, i.e. a consensual conversation.
- If the victim complains, that's an obvious indication the conduct is unwelcome, but the district should not wait for a complaint to investigate potentially prohibited conduct.





## “Welcomeness” of Conduct

- In order for conduct of a sexual nature to constitute sexual harassment, it must be “unwelcome.”
  - OCR always views sexual conduct between an adult and an elementary student as unwelcome and OCR strongly presumes that sexual conduct between an adult and secondary student is unwelcome.
  - Whether student-to-student sexual conduct is welcome or unwelcome must be determined on a case-by-case basis.





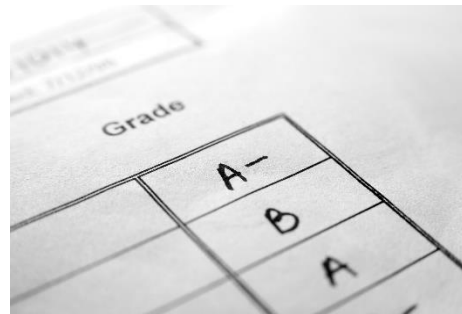
## C. “Severe or Pervasive”

- Generally, a single or isolated incident is not enough to create a hostile environment.
- However, a single incident of harassment which is egregious or unusually severe may be sufficient to create a hostile work environment, particularly when the harassment is physical.
  - E.g. Assault.



## “Severe or Pervasive” (cont’d)

- Factors to consider include whether the conduct was: abusive, derogatory, frequent, humiliating, or physically threatening.
- Severe or pervasive prong is met if the conditions of an individual’s employment or education are altered.
  - E.g. student’s semester grade hinges on the submission to a sexual advance by a teacher.





## Harassment

- The *intent* of a harasser does not matter – the test for harassment is from the viewpoint of a reasonable person and victim – it is an objective standard.
- The prohibition against sexual harassment does **not** extend to legitimate, non-sexual touching (such as a kindergarten teacher’s consoling hug for a child with a skinned knee).





## Other Violations of Anti-Harassment Laws

- **Retaliating** against a person who has made a report or filed a complaint alleging harassment, or who has participated as a witness in a harassment investigation;
- Filing a malicious or knowingly false report or complaint of harassment;
- Disregarding, failing to investigate adequately, or delaying investigation of allegations of harassment, when responsibility for reporting and/or investigating harassment charges comprises part of one's supervisory duties.



## Policy Requirements

- Statement prohibiting harassment, intimidation, or bullying
- Suspension possible for harassment, intimidation, or bullying by electronic act
- Definition of harassment, intimidation, or bullying (at least as broad as the statute)
- Procedure to be used for reporting incidents
- Procedure for responding and investigating reports



## Policy Requirements

- Strategy for protecting victim or other person from new or additional harassment
- Strategy for protecting from retaliation following a report
- Personnel must report incidents
- Parent/guardian must be notified to the extent permitted
- Procedure for documentation
- Means by which a person may report anonymously





## Policy Requirements

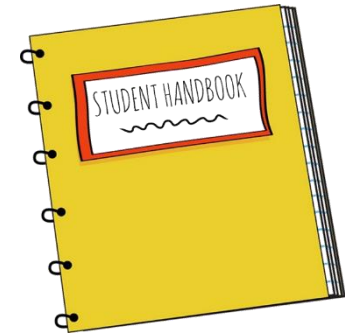
- Disciplinary procedure for students found “guilty” of harassment, intimidation, or bullying
- Prohibiting deliberately false reports of these actions and the disciplinary procedures that would follow
- Semiannual reports to Board and on website







## Notice of Policy



- The policy must be put in:
  - Student handbooks
  - Any publications that set forth comprehensive rules, procedures, and standards of conduct for schools and students in the district
- Train employees
- Train students annually
- Notify parents annually



# Class Act: Updates in Education Law





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# Areas of School Operations Impacted by Title IX

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## Applicability of Title IX

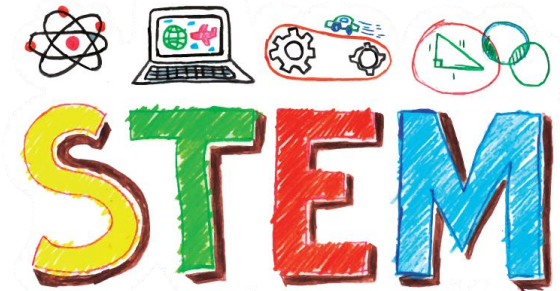
- Title IX impacts **many** aspects of school district operations
  - Not limited to athletics (although this is the context in which most people think of the regulations)
- Also has applicability to:
  - Recruitment, admissions and counseling
  - Funding (including booster groups)
  - Athletics and extra-curricular activities
  - Pregnant and parenting students
  - Discipline





## Recruitment, Admissions and Counseling

- School districts must be on the lookout for issues related to:
  - vocational schools
  - STEM schools
  - open enrollment
  - assignment of guidance counselors
  - content of counseling (schools, career options)





## Funding

- School districts are responsible to ensure
  - “that benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.”
- This is true even if the funds are raised by the student-athletes themselves or by a booster club and then “donated” to the school district.
- “Equivalent” does not mean “identical” per Regulations and OCR Policy Interpretation. Comparable standard.





## Funding from Booster Groups

- Booster group donations may result in Title IX liability for a district if the funds are *not* equally distributed among boys' and girls' teams
- Booster groups often generate and designate money for a specific sport, which leads to an imbalance among sexes
- It is the responsibility of the BOE to correct any imbalance, which may entail allocating its own resources





- OCR states in the *Title IX Athletics Investigator's Manual*:
  - *Where booster clubs provide benefits and services that assist only teams of one sex, the institution shall ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes*





## Funding and Facilities

- Locker number, size, and quality relative to team size
- Number, size and quality of shower stalls, restroom facilities, mirrors, chairs, benches.
- Material, paint
- Team rooms- size and amenities, including entertainment





## Funding and Facilities (Quality)

- Location
- Aesthetics: appearance should be similar in quality from the outside, dimensions
- Playing surface quality, turf, materials used in infields and warning tracks, field surface uniformity.
- Weather related concerns. E.g. did seasonal flooding affect mostly one group?
- Age
- Lighting
- General conditions
- Restroom facilities
- Coaching evaluation locations
- Videotaping locations
- Quality and capacity of score boards, spectator seating, spectator restrooms, concessions, public address systems, press boxes, and media.





## Facilities and Facilities (Availability)

- Is there any limit in using the field that applies more to girls than boys? For example, are the boys able to use their field more often and more freely because it is on campus?
- Does the district provide transportation to both teams? Neither?
- Consider the proximity of practice or work out areas- if any - to the fields. Is shelter available at only one field?
- Do summer camps have equal access?
- In general, compare teams' seasons, schedules, and practice times





## Athletics and Extracurricular Activities

- Sex discrimination prohibited on basis of:
  - student interests and abilities, and
  - benefits and opportunities.
- Standard for non-discrimination based on interests and abilities: equal athletic opportunities for members of both sexes, effectively accommodating interests and abilities.







## Athletics and Extracurricular Activities

- OCR 3-part test for assessing nondiscriminatory athletic participation based on interests and abilities:
  - Participation opportunities substantially proportionate to respective enrollments;
  - Members of one sex underrepresented, district show history and continuing practice of program expansion which is demonstrable responsive to developing interests;
  - Members of one sex underrepresented, if continuing practice not established, district show interests and abilities fully and effectively accommodated by present program.



## Athletics and Extracurricular Activities

- OCR factors for determining non-discrimination based on benefits and opportunities:
  - Equipment and supplies
  - Scheduling of games and practice times
  - Travel and per diem allowances
  - Coaching and tutoring
  - Compensation of coaches and tutors
  - Locker rooms
  - Practice facilities and training facilities
  - Publicity





## Pregnant and Parenting Students

- Discriminating against any student on the basis of pregnancy, child birth, termination of pregnancy or recovery therefore is prohibited
  - This includes EXCLUDING any student from an education program (including vocational education) or ACTIVITY (including extra-curricular activity)



## Discipline

- Separate or different rules of behavior, sanctions, or other treatment based on sex prohibited.
  - Includes: no discipline based on gender identity, or failure to conform to stereotypical notions of masculinity or femininity in behavior OR appearance (dress codes)
- Recommendation: record review for disproportionality, disparate impact, systemic problems/trends.





## Classes and Extracurricular Activities

- Narrow categories where intentional separation based on sex **is permitted** under Title IX:
  - Contact sports in PE class
  - Classes or portions of classes on human sexuality
  - Other miscellaneous catch-all category: class/activity based on one of two important objectives, 1) to improve students' educational achievement, or 2) to meet the particular, identified educational needs of students



## Employment (Including Student Employment)

- Applies to the following activities:
  - Recruitment
  - Selection
  - Promotion
  - Job classification/structure
  - Compensation
  - Granting of leave
  - Benefits
  - Pregnancy
  - Marital or parental status







# Class Act: Updates in Education Law





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# Duties of a Title IX Compliance Officer

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## Title IX Coordinator

- Each school must designate *and authorize* at least one employee to coordinate its efforts to comply with its Title IX responsibilities.
  - Must be known as the “Title IX Coordinator”
  - Not a Compliance Officer anymore
- Add “Title IX Coordinator” to existing job title of person in the role
- Stated duties must specifically reflect “Title IX Coordinator” responsibilities
- Be sure those responsibilities give Title IX coordinator sufficient authority to perform the required tasks



## Title IX Coordinator *cont'd*

- At least 1 person must be designated **and actually serving** as the Title IX coordinator at all times
- Make sure the person has time to fulfill this role
- If someone is not designated the Title IX Coordinator, and that person's job title does not reflect that fact, then do so ASAP







## Considerations

- Title IX coordinator's role should be independent and should report directly to the senior leadership
- Designating a full-time Title IX coordinator will minimize risk of conflict of interest and ensure sufficient time is available to perform all the responsibilities
- Although not required by Title IX, multiple coordinators may be good practice for larger school districts
  - If there are multiple Title IX coordinators, one should be designated as the “lead” Title IX coordinator who will have ultimate oversight responsibility





## Responsibilities and Authority

- Coordinate the school's compliance with Title IX
  - This includes grievance procedures for resolving Title IX complaints
- Coordinate and oversee the school's responses to all complaints and reports involving possible sex discrimination
- Obtain knowledge of school policies and procedures on sex discrimination
  - Should be involved in the drafting and revision of such policies and procedures





## Responsibilities *cont'd*

- Provide or facilitate ongoing training, consultation, and technical assistance on Title for all students, faculty, and staff
- Explain complaint procedures to complainants and respondents
- Oversee investigations of reports and complaints of sexual misconduct
  - Recommends on whether report/complaint constitutes sexual misconduct
  - Appoint an investigative team
  - Ensure complaints are handled properly
  - Inform all parties of grievance process
  - Maintain information and documentation related to investigation in a secure manner
  - Monitor compliance with timeframes



## Responsibilities *cont'd*

- Recognize the Coordinator is *not* the Decisionmaker
- Monitor and advise in ways such as:
  - Regularly reviewing all reports and complaints
  - Conducting an annual climate survey
  - Organize and maintain files
  - Regularly assess the school's compliance with Title IX
  - Regularly consult with the senior leadership to promote awareness and discussion





## Responsibilities *cont'd*

- Other Coordinator responsibilities:
  - Identify and address any patterns and/or systemic problems
  - Provide training on policies and procedures on sex discrimination & harassment
  - Conduct constituent surveys for analysis and consideration
  - Monitor students' participation in athletics & extra-curricular activities for disproportionate impact
  - Monitor students' participation in academic programs for disproportionate impact



## Visibility of Title IX Coordinator

- Must be visible in the school community
  - Notice of nondiscrimination posted
    - Note that questions should be directed to the Title IX coordinator
    - Via bulletins, announcements, application forms etc.
  - Students and employees must be notified of the name, office address, telephone number, and email address of the current Title IX coordinator
    - Contact information must be widely distributed and easily found on the website or in various publications





## Interim Measures

- Consider & coordinate interim measures during the investigation of a complaint
- Contact complainant confidentially to discuss availability of supportive measures
- Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education
  - The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs





## Interim Measures *cont'd*

- Explain to complainant that a formal complaint is not necessary in order to implement supportive measures
- Supportive or interim measures should be designed to preserve or restore a student's access to the school's education program or activity, regardless of the type of complaint.
- Supportive measures may include the following:
  - Academic course adjustments
  - Counseling
  - No contact orders
  - Schedule changes



## Interim Measures *cont'd*

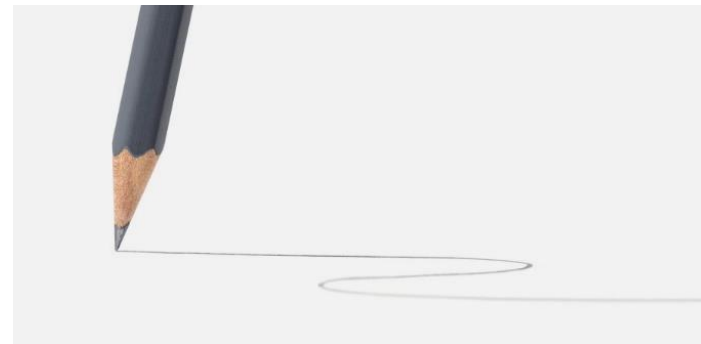
- Consider the complainant's wishes
- Be sure measures are:
  - Non-punitive
  - Non-disciplinary
  - Not unreasonably burdensome to the respondent
- Goal is to promote:
  - Equal access to educational opportunities
  - Protect safety
  - Deter sexual harassment





## Investigation

- A complainant's wishes with respect to whether the school investigates should be respected *unless* the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances
- Keep investigations equitable





## What constitutes an “equitable” investigation?

- **Burden** is on the school, not the parties, to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and whether a hostile environment has been created and must be redressed
- Investigator must be a person without any perceived conflicts of interests and biases for or against any party
  - Institutional interests should not interfere with impartiality
- Title IX Coordinator is *not* the complainant, even if she signs a formal complaint



## What constitutes an “equitable” investigation? *cont’d*

- Requires a trained investigator to:
  - analyze and document the available evidence to support reliable decisions,
  - objectively evaluate the credibility of parties and witnesses,
  - synthesize all available evidence, and
  - take into account the individual circumstances of each case
- Allow parties to be represented, even if not by an attorney





## What constitutes an “equitable” investigation? *cont’d*

- School should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and sufficient time to prepare a response before any initial interview
  - Sufficient details include:
    - Identities of parties involved, the specific section of the code of conduct allegedly violated, the precise conduct that allegedly occurred, the date and location of the alleged incident
- Each party should receive written notice in advance of any interview or hearing
- Cannot implement gag orders or stop a party from discussing allegations or gathering evidence





## What constitutes an “equitable” investigation? *cont’d*

- The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence
- Reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings
- Send parties and their advisors evidence directly related to their allegations, in electronic or hardcopy format, with at least 10 days to inspect, review and respond to the evidence
- Give parties and advisors a copy of the investigative report summarizing the relevant evidence, in electronic or hardcopy format, with at least 10 days to respond



## Informal Investigations

- A school **may** facilitate an informal resolution (including mediation) to assist the parties in reaching a voluntary resolution if:
  - If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation after receiving a full disclosure of the allegations and their options for formal resolution and,
  - if a school determines that the particular Title IX complaint is appropriate for such a process





# Investigation Dos and Don'ts





## Investigator Dos

- Be open and receptive to the complaint.
- Take the complaint seriously even if it sounds far-fetched or frivolous.
- Reserve judgment on whether you believe the complainant.
- Follow Board procedures for gathering evidence and conducting interviews.
- Respond promptly. Do not wait to undertake an investigation.
- Take steps to prevent threats or acts of violence even if the investigation is pending.



## Investigator Don'ts



DOs



DON'Ts

- Make light of a complaint.
- Show bias when conducting witness interviews.
- Promise that all information will be kept confidential. It is appropriate to state that information will be kept as confidential as possible given the obligation to respond to the complaint.
- Discuss the investigation with individuals who do not have a “need to know”.



## Dismissal

- Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S.
  - Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.
- Schools may, in their discretion, dismiss a formal complaint or allegations if: 1) the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations; 2) the respondent is no longer enrolled or employed by the school; or 3) if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.





## Hearings

- K-12 schools are not required to conduct live hearings.
- Determine whether a live hearing is necessary on a case-by-case basis.
- Perhaps a live hearing is acceptable for high school students or students over a certain age.
- Regardless of having a hearing, provide each party the opportunity after the completion of the investigative report to submit written, relevant questions that the party wants asked of another party or witness, provide each party with the answers, and provide for limited follow-up questions.



## General Principles

- Respond meaningfully to every known report of sexual harassment and investigate every formal complaint.
- Promote and apply basic due process protections for students, including:
  - a presumption of innocence throughout the process
  - written notice of allegations and any investigative interview, meeting or hearing
  - opportunity to review all evidence collected
  - a right to respond
  - the right to cross-examination, subject to "rape shield" protections



Class Act:  
Updates in  
Education  
Law

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# Changes to Title IX Regulations

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## New Title IX Rule

- U.S. Department of Education, Office of Civil Rights (OCR), released the final rule amending Title IX Regulations on May 6, 2020.
- New Final Rule goes into effect on August 14, 2020.







## Title IX Coordinator

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities.
  - Must be known as the “Title IX Coordinator”
- Title IX Coordinator job title and stated job duties must reflect this before August 14, 2020.

AUGUST 2020						
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## “Sexual Harassment”

- Title IX Regulations now define the term “sexual harassment”.
- Prior to the final rule, the term was loosely defined by interpretive case law and OCR Dear Colleague Letters.





## “Sexual Harassment”

### Old Definition (from OCR guidance)

- Unwelcome conduct
- As determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities

### New Definition (Final Rule)

- Unwelcome conduct
- As determined by a reasonable person
- To be so severe, pervasive, **and objectively offensive** that it **effectively denies** a person’s equal access to the recipient’s education program or activity



## WHEN MUST A SCHOOL RESPOND TO SEXUAL HARASSMENT?

- A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.





## REPORTING SEXUAL HARASSMENT: WHO, HOW AND WHEN?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct.
  - New Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints).
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Or by any means that results in the Title IX Coordinator receiving the person's report.
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.



## REPORTING SEXUAL HARASSMENT: FORMAL COMPLAINT

- “Formal complaint” is the document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
  - Third party reporter is not authorized to file a formal complaint.
  - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.
    - Title IX Coordinator is authorized to sign a formal complaint which triggers investigation. This includes signing of formal complaints over a complainant’s objections.





# REPORTING SEXUAL HARASSMENT: FORMAL COMPLAINT

- “Document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.





## Actual Knowledge

### Old Rule (from OCR guidance)

- A school has a responsibility to respond promptly and effectively if a school knows or should have known about sexual harassment

### New Rule (Final Rule)

- A school with actual knowledge of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent



# New Rule & Case Law Definition

## Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998)

**Knowledge:** Notice of sexual harassment or allegations of sexual harassment to:

1. A recipient's Title IX coordinator
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
3. **Any employee of an elementary and secondary school**

"Notice" includes, **but is not limited to**, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.





## Deliberate Indifference

- From the *Gebser* Court:
  - “[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.”





## Deliberate Indifference

### Old Definition (from OCR guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

### New Definition (Final Rule)

- Failure to respond reasonably in light of known circumstances.



## New: Initial Response 34 C.F.R. 106.44(a), .30(a)

Must treat complainants and respondents equitably:

- Offer supportive measures to both
- Follow a grievance process before disciplining or sanctioning respondent







## New: Initial Response 34 C.F.R. 106.30(a), .44(a)

Title IX Coordinator must promptly, even if no formal complaint is filed:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint





## Supportive Measures

Old Term (from OCR guidance)	New Term (Final Rule)
<ul style="list-style-type: none"><li>• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access.</li><li>• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents.</li></ul>	<ul style="list-style-type: none"><li>• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).</li><li>• Should be designed to restore or preserve equal access to the education program or activity without unreasonably” burdening the other party.</li></ul>



## Supportive Measures

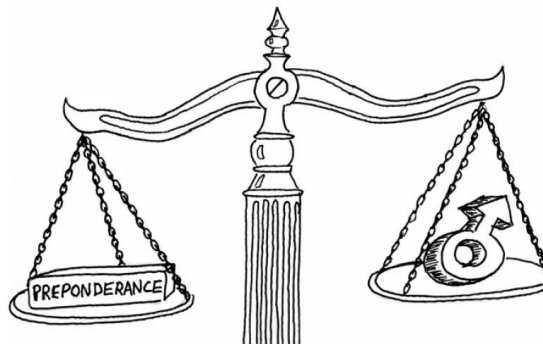
- Examples:
  - Counseling
  - Course modifications
  - Schedule changes
  - Increased monitoring or supervision
- A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees who pose an imminent threat.
- Supportive measures give districts “wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant’s equal educational access.” Actions such as changing a respondent’s class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not.





## Complainant Participation Refusal

- District must provide complainant (alleged victim) with access to supportive measures and must provide complainant with written notice of grievance procedure, even if complainant is unwilling to participate.





## **New: Formal Complaint Response 34 C.F.R. 106.45(b)**

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint.
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution.
- A complainant (alleged victim of sexual harassment) must be participating in or attempting to participate in the education program or activity of the district at time formal complaint is filed.



## Basic Required Elements 34 C.F.R.106.45(b)(1)

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for Title IX Coordinator, Investigator or decision makers
- Presumption respondent not responsible
- Reasonably prompt time frames







## **Basic Required Elements 34 C.F.R.106.45(b)(1)**

- Description or list of possible discipline/other remedies
- Statement of standard used (Preponderance or clear/convincing)
- Appeal procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver





## **More Steps: Written Notice 34 C.F.R. 106.45(b)(2)**

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview.
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)



## **More Steps: Written Notice 34 C.F.R. 106.45(b)(2)**

- Notice must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process.
  - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence.
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process.
- Must be supplemented if new allegations opened for investigation.



## Dismissals

### Mandatory if conduct alleged:

- Not sexual harassment if true.
- Did not occur in the school's program or activity (if there is dispute regarding this, the investigation may be required to determine whether there is jurisdiction).
- Did not occur in the United States.

\*\*can still address under non-Title IX policy





## Dismissals

### Permissive if:

- Complainant requests to withdraw.
- Respondent's enrollment or employment ends.
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant).





## Investigation 34 C.F.R.106.45(b)(5)

- Burden of proof on school.
- Certain treatment records cannot be obtained without voluntary, written consent.
- No restriction of rights of parties to discuss allegations or gather or present evidence.
- Same opportunities for others present during.
- Interviews or related proceedings (e.g., attorney or non-attorney advisor).







## Investigation 34 C.F.R.106.45(b)(5)

- Written notice to parties of date, time, participants, purpose, and location of each.
- investigative interview with sufficient time to prepare.
- All evidence provided to parties and their advisors with 10 days to respond before report.
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility.



## **Determinations of Responsibility 34 C.F.R.106.45(b)(6)**

- Live hearing with live cross by party advisors NOT required for K-12.
- Hearings permitted for K-12 (include decision in grievance procedure), with each party allowed to submit written, relevant questions to be asked of another party or witness to the decision maker, who will provide each party with the answers and the opportunity for follow-up questions.
- Questions about a complainant's prior sexual behavior or sexual predisposition only permitted to establish that another person committed the alleged conduct or that the conduct was consensual.



## Hearing

- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.



## Written Questions Required

- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow up questions from each party.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.





## Decision

- The District's grievance process must state whether the standard of evidence to be used to determine responsibility is:
  - The preponderance of the evidence standard; or
  - The clear and convincing evidence standard
- Must apply the same standard of evidence for formal complaints against students as for formal complaints against employees.



# Determinations of Responsibility 34 C.F.R. 106.45(b)(7)

- Decision maker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
  - Allegations
  - Procedural steps taken
  - Findings of fact
  - Application of code of conduct to facts
  - Statement of and rational for result as to each allegation including:
    - Determination of responsibility
    - Any disciplinary sanctions
    - Whether remedies to restore or preserve equal access to the educational program or activity will be provided







## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>▪ Not required</li><li>▪ Must be provided equally to both parties, if provided</li><li>▪ No limitation on basis for appeals, if provided</li></ul>	<ul style="list-style-type: none"><li>▪ Must offer to both parties for dismissals and final determinations in the following circumstances:<ul style="list-style-type: none"><li>– Procedural irregularity</li><li>– New evidence not reasonably available</li><li>– Conflict of interest against Title IX Coordinator, Investigator, Decision maker</li></ul></li><li>▪ Can offer for other reasons on equal terms</li></ul>



## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>■ No requirement that the decision maker on appeal be different from investigators/decision makers in other phases of the process.</li></ul>	<ul style="list-style-type: none"><li>■ Different Decision maker:</li><li>■ May not be the Title IX Coordinator, investigator, or decision maker</li><li>■ Must not have a conflict of interest or bias against complainants and respondents generally or individually.</li><li>■ Must receive training.</li></ul>



## Retaliation Prohibited

- No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.





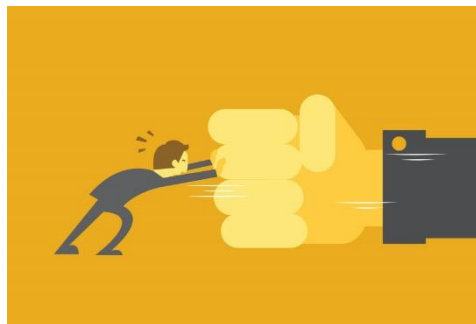
## Retaliation Prohibited

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.



## Not Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.





## Other Requirements: Recordkeeping 106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures





## Other Requirements: Recordkeeping 106.45(b)(10)

- Must document for every instance:
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity.
  - If no supportive measures provided, why that was not deliberately indifferent.





## Other Requirements: Training

- Required for all staff (identify and report sexual harassment).
- Required for Title IX Coordinator, investigators, and decision makers (both decision and appeal).
  - Promoting impartial investigations and adjudication of formal complaints
  - Must not be based on sex stereotypes
- Maintain materials used for trainings for 7 years and post materials on website (or otherwise make available to public if the district does not have a website).





## Regulations Not Impacted by New Rule

- Current Title IX regulation provisions governing athletic participation, employment and single-sex education were not impacted by the final rule.





## Title IX Policy Notice



- District must provide notice of nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will handle such reports.
- Notice must include the Title IX Coordinator's name, title, email address, office address and telephone number.
- Notice must be provided to: applicants for employment, students, parents/guardians, employee unions.
- Notice must be posted on: district website and in any handbook provided to employees, students, parents/guardians, and employee unions.





Class Act:  
Updates in  
Education  
Law





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# TITLE IX DISCIPLINE AND ITS IMPACT ON STUDENT DUE PROCESS RIGHTS

August 14, 2020

Walter | Haverfield Education Law Group Webinar  
*in partnership with BASA*



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& Kathy Perrico ([kperrico@walterhav.com](mailto:kperrico@walterhav.com))



## TOPICS

- Overview of Substantive and Procedural Due Process
- New Grievance Process
- Emergency Removal
- First Amendment Issues
- Questions





# SUBSTANTIVE AND PROCEDURAL DUE PROCESS: AN OVERVIEW





## STUDENT RIGHTS- GENERALLY

- **Complainant (victim)** has right to attend school without being subjected to unwelcome sexual conduct, especially conduct so severe, pervasive, and objectively offensive that it denies equal access to education.
- **Respondent (alleged perpetrator)** has right to due process before discipline is imposed and right not to be disciplined at all for activities protected by First Amendment.



## RESPONDENT'S DUE PROCESS RIGHTS

Students accused of misconduct are entitled to **substantive** and **procedural** due process.

- **Substantive:** District cannot arbitrarily or unreasonably deprive students of education. Discipline must be supported by substantial, reliable, and probative evidence in the record. Typically “preponderance of the evidence” standard used for most disciplinary issues.
- **Procedural:** In deciding whether discipline is warranted, students are entitled to fair procedures. More procedures required for more significant discipline.



## STUDENT DUE PROCESS RIGHTS

Students are entitled to **substantive** and **procedural** due process.

- **Substantive:** Does the evidence prove that the alleged perpetrator (respondent) sexually harass / sexually assault the victim (complainant)?
- **Procedural:** In answering the above question, did the district provide a fair chance for the alleged perpetrator to prove his or her innocence and respond to the allegations?





## WHAT CHANGED AND WHY?

- New regulations prompted by parent and student concerns that alleged perpetrators were not given fair chance to prove their innocence and that “preponderance of the evidence” standard was too low to expel a student from university or school.
- New regulations attempt to address both substantive and procedural issues.





## CHANGES TO SUBSTANTIVE DUE PROCESS RIGHTS

- The district must now presume innocence throughout the process.
- The burden is on the district to show that discipline is warranted.
- Schools may apply either “**preponderance of the evidence**” or “**clear and convincing**” standard, but must be consistent.



## EVIDENTIARY STANDARDS

- **Preponderance of the Evidence:** It is “more likely than not” that the perpetrator committed the action. Used in civil context. Also known as 51% rule.
- **Clear and Convincing:** It is “substantially more likely to be true that the perpetrator committed the act.”
- **Beyond a Reasonable Doubt:** The only logical explanation is that the perpetrator committed the act/crime, no other logical explanation exists. This is used in the criminal context because a high standard is needed to deprive someone of freedom.



## CHANGES TO PROCEDURAL DUE PROCESS RIGHTS

- Single investigator and decision-maker no longer allowed.
- Detailed grievance process with a focus on:
  - Notice of allegations
  - Cross examination
  - Opportunity to review and response to evidence
- Explicit prohibition on conflicted or biased coordinators, investigators, decision-makers.
- Emphasis on equal opportunities for both complainants and respondents to participate in the process.





# NEW GRIEVANCE PROCESS





## GRIEVANCE PROCESS

- General Emphasis
- Notice of Allegations
- Investigation
- Determination of Responsibility
- Appeals







## GRIEVANCE PROCESS – GENERAL EMPHASIS

- Complainants and respondents must be treated equitably.
- Objective evaluation of all relevant evidence
- All decision makers and investigators must be free of conflict or bias
- Presumption that respondent not responsible for alleged conduct until decision is made.



## NOTICE OF ALLEGATIONS

- Both respondent and complainant must receive notice of grievance process – explaining the process and the district’s policy.
- Notice must include statement that respondent is presumed not responsible until final decision is made.
- Notice must be given with sufficient time to prepare response before any initial interview.
- Notice must be provided again if new allegations come to light during investigation.



## NOTICE CONT.

- Notice must include details known at the time:
  - Date and location of alleged incident
  - Identities of the parties
- Notice must also include:
  - Right to have advisor, may be attorney
  - Right to inspect and review evidence
  - Prohibition on knowingly making false statements/submitting false information





# GRIEVANCE PROCESS- INVESTIGATION OVERVIEW

- Investigative interviews
- Time to review and respond to evidence
- Investigative Report
- Time to review and respond to Report
- Hearing (optional for K-12)
- Determination regarding responsibility
- Appeals



# GRIEVANCE PROCESS- INVESTIGATIVE INTERVIEWS

- District must provide equal opportunity for both parties to:
  - present witnesses and evidence at interviews/meetings.
  - Have advisor present (restrictions on advisor's participation ok as long as apply to both sides) for any interviews, meetings.
  - Written notice of date/time/location/participants/purpose for all hearings, interviews, meetings with sufficient time to prepare.



## INVESTIGATIVE INTERVIEWS Cont.

District may not:

- Restrict either party from discussing allegations, gathering, or presenting relevant evidence.
- Access, consider, or disclose medical/psychological records without that party's voluntary consent.







## RESPONDING TO EVIDENCE

- After the interviews are completed and evidence has been gathered, District must send the evidence to each party in electronic or hard copy.
- Then the parties have 10 days to submit written response.
- Investigator will consider responses prior to completing investigation report.



## INVESTIGATIVE REPORT

After parties submit their responses, the District creates an investigative report fairly summarizing the evidence.

- Report must be sent to parties 10 days before hearing or other time to decide.
- Parties must be allowed time to review and respond, including asking written, relevant questions.



## HEARING /QUESTIONING

- Live hearing is optional for K-12, but required for post-secondary schools.
- Party's advisor (not party) must be allowed to cross examine other party and witnesses directly, orally, and in real time.
- District must – upon request – provide for live hearing in two separate rooms or virtually.
- District must provide advisor free of charge to conduct cross examination if party does not have advisor.
- Cross examination questions have to be relevant and can only concern sexual predisposition or prior sexual behavior in limited circumstances.
- District must create hearing audio recording or transcript and make it available for both parties.



## HEARING /QUESTIONING

- **Because hearing is optional and involves many additional regulations, we recommend against it.**
- Even if there is no hearing, districts must allow each side to question the other, in written form.





## HEARING /QUESTIONING Cont.

Questioning in written form must include opportunity for:

- Written relevant questions
- Providing each party with answers
- Allowing for additional, limited follow up questions.





## HEARING /QUESTIONING Cont.

Questioning in written form may not include:

- Questions /evidence about complainant's sexual predisposition
- Questions/evidence about complainant's prior sexual behavior. (Exception: Prior sexual behavior ok to show someone else committed the conduct or to prove consent.)
- Decision-maker must explain why question is excluded.





## DETERMINATION

- Decision-maker (not Title IX coordinator or investigator) must issue written determination regarding responsibility.
- Apply either “**preponderance of the evidence**” standard or “**clear and convincing evidence**” standard depending on District’s policy.





## DETERMINATION Cont.

Written Determination must include:

- Allegations of sexual harassment
- Description of procedural steps (notification, interview, site visits, evidence gathering methods, hearing)
- Findings of fact
- Conclusions re: applying code of conduct to facts
- Statement & rationale for results for each allegation, including: responsibility determination, disciplinary sanctions for respondent, remedies to restore or preserve equal access for complainant
- Procedures and bases for appeals.



## DETERMINATION Cont.

- Must be provided to both simultaneously;
- Becomes final after appeal time has passed or when appeal result is provided.
- Title IX Coordinator responsible for implementing remedies.





# APPEALS

- District must allow appeal if either party alleges:
  - Procedural irregularity affecting outcome
  - New evidence not reasonably available by determination date affecting outcome
  - Title IX coordinator, investigator, or decision maker had a conflict of interest or bias affecting outcome.
- District may allow appeal for other reasons or not, as long as opportunity is equal for both sides.



## APPEALS Cont.

District must:

- Notify other side if appeal filed.
- Implement appeal procedures equally.
- Appoint new and trained decision maker without conflict of interest or bias (cannot be Title IX coordinator, investigator, or previous decision maker).
- Afford both sides reasonable and equal opportunity to submit written statement challenging outcome.
- Issue written decision with result and rationale, provide simultaneously to both parties.





# INFORMAL RESOLUTIONS

- District may not:
  - require informal resolution
  - offer informal resolution until a formal complaint is filed.
  - facilitate informal resolution where allegations are by student against employee.





## INFORMAL RESOLUTIONS

District may facilitate informal resolution after formal complaint filed, but must:

- Provide written notice to both parties with:
  - Allegations
  - Informal resolution process including any provisions that **after** agreeing to a resolution, party cannot withdraw and resume formal grievance process.
  - Consequences of participating including records maintained or shared.
- Obtain both parties' written and voluntary consent to informal resolution



# EMERGENCY REMOVALS





## EMERGENCY REMOVAL

Districts may emergency remove student if individualized safety and risk analysis determines that sexual harassment allegations pose immediate threat to student physical health or safety such that removal is justified.

- Notice and opportunity to challenge the decision must be provided immediately after removal.
- Comply with all laws and regulations (federal and state) related to emergency removals and students with IEPs and 504 Plans.



## EMERGENCY REMOVAL: EXAMPLE

- Susie tells a teacher that Robert sexually assaulted her in the bathroom.
- If the administrator's individualized safety and risk analysis shows that Robert's continued attendance creates immediate threat to student health or safety, administrator may:
  - Issue notice of intent to suspend and then provide opportunity to appear in informal hearing to challenge suspension or otherwise explain actions.
  - Issue notice of suspension with intent to expel, plus notice of opportunity to appear to challenge the reason for expulsion w time and place btw 3-5 days. Follow standard procedures for hearing, appeals etc.
  - Don't forget MDR for students with IEP or 504 plans before expulsion hearing or within 10 days of decision to suspend resulting in over 10 cumulative days out of school (change in placement)



# FIRST AMENDMENT





## FIRST AMENDMENT

- Sometimes sexual harassment complaints are outside the disciplinary process because the alleged conduct is protected by the First Amendment.
  - Ex. Off-campus and using his own equipment, Robert creates a Tiktok page with disrespectful content about Susie. There is no substantial disruption to the school environment as a result, but Susie files a complaint.
- Disciplining Robert may be prohibited by the First Amendment, and the district would need to dismiss any formal complaints against him.





## FIRST AMENDMENT

- However, the district can and should take non-disciplinary action:
  - offering both parties counseling, evaluation where appropriate
  - Implementing monitoring, additional supervision
  - Changing alleged perpetrator's class schedule, other separation approaches
  - Anti-harassment speakers, programming, education.
- Consulting with counsel is usually a good idea for any First Amendment issues because the decisions can be very fact-specific.



# Class Act: Updates in Education Law





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